Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

LUIS MANUEL VEREZ

and

MILTON VIDAL, Petitioners,

vs. Record No. 85-1535

COMMONWEALTH OF VIRGINIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF VIRGINIA

PETITIONERS' REPLY BRIEF

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QUESTIONS PRESENTED

I

WHETHER THIS CASE MERITS REVIEW BY THIS COURT?

II

WHETHER THE VIRGINIA SUPREME COURT ERRED IN ITS FINDING THAT THE SEARCH AND SEIZURE WAS LAWFUL, PARTICULARLY SINCE OFFICERS CREATED THE NEED FOR QUICK ACTION BY SENDING IN THE INFORMERS WITH NO MONEY AND WITH A FAULTY TRANSMITTER?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED..... i

TABLE OF AUTHORITIES..... iii

PRELIMINARY STATEMENT..... 1

REASONS FOR GRANTING THE WRIT.... 1

CONCLUSION..... 9

TABLE OF AUTHORITIES

	Page
Chimel v. California, 395 U.S. 752	3
Gouled v. United States, 255 U.S. 298	8
Ker v. California, 374 U.S. 23	3,8,9
People v. Soto, 465 N.Y.S. 2d 82	5
Pierre v. Louisiana, 306 U.S. 354	3
Spano v. New York, 360 U.S. 315 (1979)	3
Terry v. Ohio, 392 U.S. 1	4
Thomas v. Arizona, 356 U.S. 390	3
United States v. Hultgren, 713 F2d 79	7,8
United States v. Karo, 104 S. Ct. 3296	4,5

Page

United States v. Palumbo,
735 F2d 1095..... 7

United States v. U.S. District
Court, 407 U.S. 297..... 4

arrest the petitioners and then obtain a search warrant. (Tr.p. 127). But what reasoning did the officers use to make that decision? Why did the officers not deem it practicable to obtain a warrant or to seek the guidance of a magistrate between the 9:00 p.m. phone call and the 1:00 a.m. entry? Why did the police not recognize that the petitioners were settled in a protected dwelling with protected privacy rights? Did the officers create exigent circumstances by sending in the informers with no money and with a faulty transmitter thereby making the entry and search illegal?

It is not just a dispute over inferences of evidence that the Virginia Supreme Court ignored that Verez indicated to the informer, as monitored by the police, the "lady" was with him. (App.C p. 25). How can any Court attempt to apply Fourt Amendment principles

without stating the facts the officers had to rely on in determining whether it was practicable to obtain a warrant?

Verez did not just say, as respondent asserts (p.3 Respondent brief) that the lady was "in hand". Cunningham testified Verez said "he had it around him somewhere, I mean in his immediate vicinity.....In hand." (App. C).

Petitioners are correct that the Virginia Supreme Court affirmed a vague or non-existing finding of exigent circumstances.

Findings of state courts are by no means insulated against examination by this Court. Spano v. New York, 360 U.S. 315, 316 (1959); Thomas v. Arizona, 356 U.S. 390, 393; Pierre v. Louisiana, 306 U.S. 354; Ker v. California, 374 U.S. 23 at 34.

THE VIRGINIA SUPREME COURT ERRED IN ITS FINDING THAT THE SEARCH AND SEIZURE WAS LAWFUL, PARTICULARLY SINCE THE OFFICERS CREATED THE NEED FOR QUICK ACTION BY SENDING IN THE INFORMERS WITH NO MONEY AND WITH A FAULTY TRANSMITTER.

The Virginia Supreme Court decision is at odds with prior decisions of this Court, federal and state courts, as cited in petitioners' petition.

The respondent omits case law cited by petitioners which sets out one of the basic rules in these cases. Clearly "the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure." United States v. U.S. District Court, 407 U.S. 297 at 318; Terry v. Ohio, 392 U.S. 1 at 20; Chimel v. California, 395 U.S. 752 at 762.

The respondent ignores United States v. Karo, 104 S.Ct. 3296 at 3303. The

Court noted "At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable." Karo, supra at page 3303.

The respondent ignores People v. Soto, 465 N.Y.S. 2d 82, a case almost identical to this one except the informer had money to buy the drugs. They ignore the clear distinction People v. Soto draws between an arrest pursuant to a preconceived plan (as in this situation) and an arrest pursuant to exigent circumstances. If the informers had money, as in prior buys from Verez, nothing would have happened constituting exigent circumstances. Verez was not armed and there is no objective evi-

dence in the record that either of these informers had ever seen him specifically harm anyone or do any violent act. He greeted them warmly.

Partly because police do not "possess the gift of prophecy", they must and should seek guidance from a magistrate if it is practicable to obtain a warrant.

Whether respondent wants to concede it or not, the task of the police and informers was made much easier when petitioners' vehicle broke down. There is no evidence in the record that Verez had ever lied or misled these informers so as to lead them to suspect his vehicle was not broken down or that the drug transaction was not going to take place in the motel room. The respondents' many suggestions to the contrary are largely a distortion of the pertinent facts.

There is not the slightest possibility that, as respondent argues in United States v. Palumbo, 735 F2d 1095, the petitioners would become suspicious or destroy the drugs. No other defendants or accomplices existed. The petitioners were shocked and surprised by the officers' entry and shot being fired.

The officers created exigent circumstances by sending the informers in with no money. The Palumbo court noted that "the important point is that the exigency, while perhaps not unexpected, was not created by the officers." Palumbo, supra, pg. 1097.

In United States v. Hultgren, 713 F2d 79 at 80, 88, the Court ruled that after a functioning transmitter had failed, the police could go in. In this case the police deliberately sent in the informers when they knew the transmitter was not

working properly. Again the police have created the need for quick action, the precise evil the Hultgren court warned against. See United States v. Hultgren, 713 F2d 79 at 80, 88.

While it was not practicable to obtain a warrant for a drug sale somewhere "in Northern Virginia", (Tr. p.72), or at a "rest area" (Tr. p. 82), it was practicable to have a warrant when the officers went in.

This court long ago settled in Gouled v. United States, 255 U.S. 298 at 305-306, that a lawful entry is that indispensable predicate of a reasonable search. Justice Brennan pointed out in Ker v. California, 374 U.S. 23 at 53 "rigid restrictions upon unannounced entries are essential if the Fourth Amendment's prohibition against invasion of the security and privacy of the

home is to have any meaning." Although Ker v. California, supra, involved in part the proposition that those possessing the drugs might dispose of the drugs, this case has no such concerns on the part of the officers when they had completed their plan and sent in the informers. The petitioners were just waiting like sitting ducks.....but in the privacy of their room!

CONCLUSION

A writ of certiorari should be awarded.

Respectfully submitted,

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